

United States District Court  
Eastern District of California

Mark A. DuRoss,

Petitioner, No. Civ. S 04-0638 DFL PAN P

vs. Findings and Recommendations

Scott M. Kernan, Warden,

Respondent.

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Petitioner, a prisoner without counsel, seeks a writ of habeas corpus. See 28 U.S.C. § 2254. Respondent<sup>1</sup> moves to dismiss upon the ground the petition is untimely. Petitioner opposes.

Petitioner was convicted September 24, 1999. December 27, 2000, the appellate court remanded for the trial court to reduce one felony count to a misdemeanor and to re-sentence petitioner

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<sup>1</sup> Scott Kernan is substituted as respondent pursuant to Rule 2(a) of the Rules Governing Section 2254 Proceedings and Rule 25(d) of the Federal Rules of Civil Procedure.

1 accordingly but otherwise affirmed.

2 Petitioner was re-sentenced January 18, 2001.

3 Petitioner filed a petition for review in the California  
4 Supreme Court February 1, 2001. That court denied review March  
5 14, 2001.

6 Petitioner filed a habeas petition in the trial court June  
7 18, 2001. That court denied relief July 24, 2001, upon the  
8 ground petitioner failed to state a prima facie case.

9 Petitioner filed a habeas petition in the trial court August  
10 29, 2001, and the court denied relief October 26, 2001, upon the  
11 ground the petition was second or successive and petitioner  
12 failed to state a prima facie case for relief.

13 December 18, 2001, petitioner filed a third habeas petition  
14 in the trial court. December 21, 2001, petitioner requested the  
15 court "omit" the December 18, 2001 petition. January 4, 2002,  
16 the court construed petitioner's request as one for voluntary  
17 dismissal and dismissed the petition.

18 June 30, 2003, petitioner filed a fourth petition for a writ  
19 of habeas corpus, which the trial court denied July 24, 2003,  
20 upon the ground the petition was a "gross abuse of the writ  
21 process." The court advised petitioner to seek relief in the  
22 appellate court.

23 Petitioner moved for reconsideration September 4, 2003. The  
24 court denied the motion September 17, 2003.

25 Petitioner filed in the trial court fifth and sixth  
26 petitions for a writ of habeas corpus December 30, 2003. The

1 court denied both January 23, 2004, upon the grounds they were  
2 incomprehensible, barred under In re Clark, 21 Cal.Rptr.2d 509,  
3 541 (Cal. 1993), failed to state a prima facie case and were a  
4 "gross abuse of the writ process." The court advised petitioner  
5 to seek relief in the appellate court. February 4, 2004,  
6 petitioner moved for reconsideration.

7 March 9, 2004, petitioner filed a petition for a writ of  
8 habeas corpus in the appellate court. That court denied relief  
9 March 11, 2004.

10 March 30, 2004, petitioner filed his federal petition.

11 April 8, 2004, petitioner filed another petition for a writ  
12 of habeas corpus in the trial court. The court denied relief May  
13 18, 2004. May 23, 2004, petitioner sought reconsideration, which  
14 the court denied June 11, 2004.

15 September 13, 2004, petitioner filed another petition for a  
16 writ of habeas corpus in the trial court. The court denied  
17 relief October 14, 2004.

18 The trial court denied reconsideration of the fifth and  
19 sixth habeas petitions June 11, 2004.

20 A one-year limitation period for seeking federal habeas  
21 relief begins to run from the latest of the date the judgment  
22 became final on direct review, the date on which a state-created  
23 impediment to filing is removed, the date the United States  
24 Supreme Court makes a new rule retroactively applicable to cases  
25 on collateral review or the date on which the factual predicate  
26 of a claim could have been discovered through the exercise of due

1 diligence. 28 U.S.C. § 2244(d)(1). Petitioner's conviction was  
2 final June 12, 2001. See Bowen v. Roe, 188 F.3d 1157 (9th Cir.  
3 1999) (judgment on direct review becomes final when the 90-day  
4 limit for filing a petition for certiorari expires). The  
5 limitation period is tolled while a properly filed state post  
6 conviction application is pending. 28 U.S.C. § 2244(d)(2).

7 Petitioner had until June 12, 2002, to file in federal court  
8 and so unless he is entitled to tolling, his March 30, 2004,  
9 federal petition is late.

10 For purposes of tolling, a California petitioner's  
11 application is "pending" during the time between the decision of  
12 a lower court and the filing of a new petition in a higher court  
13 so long as petitioner properly is attempting to exhaust state  
14 remedies. Carey v. Saffold, 536 U.S. 214, 223 (2002); Gaston v.  
15 Palmer, 387 F.3d 1004, 1016 (9th Cir. 2004) (when a California  
16 petitioner pursues relief "as he would in a typical appeal state  
17 - i.e., bringing the same claims to the court of first instance,  
18 then appealing the denial (or otherwise seeking review) in an  
19 expeditious fashion - he will be entitled to interval tolling.").  
20 While a petitioner ordinarily will benefit from interval tolling  
21 when a court reaches the merits of his habeas application, he  
22 will not if his abuse of state court procedures undermines the  
23 very purpose of interval tolling, viz., to afford applicants "one  
24 full round" of state review to satisfy the federal exhaustion  
25 requirement. Gatson, 387 F.3d at 1016; Chavis v. LaMarque, 382  
26 F.3d 921, 925 (9th Cir. 2004).

1       The trial court reached the merits of petitioner's first and  
2 second petitions filed June 18, 2001, and August 29, 2001, which  
3 contained different claims and were filed in quick succession,  
4 and permitted petitioner voluntarily to dismiss the December 18,  
5 2001, petition, which contained two claims made in the first  
6 petition and one made in the second petition. The state court  
7 did not find these petitions to be abusive and the delay between  
8 them was not undue.

9       Giving petitioner the benefit of construing his first three  
10 petitions as "properly filed," a dubious proposition, the  
11 limitation period was tolled for 200 days, from June 18, 2001,  
12 when petitioner filed his first petition in the trial court until  
13 January 4, 2002, when the court permitted voluntary dismissal of  
14 the third petition. That left petitioner until December 29,  
15 2002, to file a federal petition.

16       Petitioner's subsequent state habeas petitions provide no  
17 basis for tolling under 28 U.S.C. § 2244(d)(2) because they were  
18 filed after the limitation period expired. See Fergusun v.  
19 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (section 2244(d)  
20 does not permit re-initiation of the limitation period when it  
21 expires before a timely state petition for post-conviction relief  
22 was filed).

23       Petitioner's March 30, 2004, federal petition is untimely.

24       Accordingly, respondent's December 10, 2004, motion to  
25 dismiss should be granted and this action should be dismissed as  
26 untimely.

1 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
2 findings and recommendations are submitted to the United States  
3 District Judge assigned to this case. Within 20 days after being  
4 served with these findings and recommendations, petitioner may  
5 file written objections. The document should be captioned  
6 "Objections to Magistrate Judge's Findings and Recommendations."  
7 The district judge may accept, reject, or modify these findings  
8 and recommendations in whole or in part.

9 Dated: June 7, 2005.

10 /s/ Peter A. Nowinski

11 PETER A. NOWINSKI  
Magistrate Judge